Finally, Applicants' commitment (¶ 24) concerning the rates for loop conditioning are inconsistent with the Act's requirement of cost-based rates. 47 U.S.C. § 252(d). Under the Commission's forward-looking, economic cost methodology, the appropriate rate for loop conditioning should be *zero* – not the hundreds (or thousands) of dollars per loop set forth in Attachment C. Pursuant to that standard, competitive LECs are entitled to rates that reflect the forward-looking economic cost of an efficiently-designed network, not rates that force competitive LECs to pay for the incumbent's embedded investments in antiquated equipment that interferes with the efficient use of those loops. 47 C.F.R. § 51.505. Thus, far from promoting competition in xDSL services, Condition VI is nothing other than an unwarranted windfall for Applicants.[69]

Structural Separation For Advanced Services (Condition VII)

Condition VII would require Applicants to establish one or more affiliates to offer certain so-called "advanced services." This affiliate would be patterned after a similar proposal in the Commission's recent *Section 706 Order*, which in turn was based on Section 272. However, the terms of Condition VII are weaker in significant respects than those considered in that proceeding as well as weaker than Section 272.

(. . . continued)
loops. In all events, there is no justification for the 12-month delay in the availability of such information.

[69] Even if rates for loop conditioning were appropriate, the condition is also deficient because, among other things, it does not require Applicants to impute those rates to their xDSL operations, nor does it provide for any "true-up" to competitive LECs after the interim rates are replaced with permanent rates. The condition also provides that the interim rates apply unless a different rate is available "to all CLECs," which seems to assume an unlawful exception to the "pick-and-choose" rules and Section 252(i) of the Act.

Condition VII proposes to define "advanced services" in a manner far broader than the meaning the Commission gave that term just months ago, bringing even ordinary dial-up Internet access within the scope of that phrase, as well as voice communications that involve packet switching at any point in their transmission path. Further, although Condition VII is completely silent on the issue, Applicants have argued in this proceeding that by utilizing a minimally separated affiliate, they can avoid the obligations that the Act imposes on incumbent LECs, such as the unbundling and resale requirements of Section 251(c). Although this claim is meritless as a matter of law, if Condition VII is adopted Applicants presumably will refuse to comply with Section 251(c) when they use an "advanced services affiliate" to provide local exchange and exchange access service – even when they provide those services in their own region, under their own brand. Applicants could even go so far as to use their advanced services affiliate to construct a "shadow network," building loops and installing other facilities to serve their most profitable customers, while denying competitive LECs the ability to obtain unbundled elements or to resell these services, and failing to upgrade the "incumbent LEC" network used by their other customers.

A. Condition VII's Definition Of "Advanced Services" Does Not Comport With The Commission's Prior Rulings

As a preliminary matter, Condition VII gives "advanced services" a vastly broader meaning than the Commission's *Section 706 NOI Report*[70] gave that term mere months ago. The report defined the statutory term "advanced telecommunications capability" as

[70] Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146 (FCC Feb. 2, 1999) ("*Section 706 NOI Report*").

telecommunications services "having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, 'bandwidth') in excess of 200 kilobits per second (kbps) in the last mile." *Id.* ¶ 20. The Commission defined "advanced services" as those services offered via "advanced telecommunications capability."[71] In stark contrast, Condition VII defines (¶ 26) "advanced services" merely as "wireline, telecommunications services . . . that rely on packetized technology and have the capability of supporting transmission[] speeds of a least 56 kilobits per second in at least one direction."

Condition VII's definition would sweep in any form of wireline telecommunications extant today so long as the transmission was, at some point in its transmission path, packetized. Fifty-six kbps is today achievable on an ordinary twisted-pair copper telephone line. The proposed standard therefore would deem dial-up Internet access via POTS lines an "advanced service," as well as voice over IP ("VoIP") or other packet-switched voice services. There is no reasoned basis for this departure from Commission precedent. Condition VII would permit Applicants to use so-called advanced services affiliates to provide a wide array of services that the Commission has expressly found are not "advanced" at all.

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[71] Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 13 FCC Rcd. 15280, ¶ 13 n.8 (1998) ("We distinguish between advanced telecommunications capability and services derived from it ('advanced services'), as in the distinction between infrastructure and applications, or between facilities and services offered to end users.").

B. Condition VII Would Give Applicants' Advanced Services Affiliates A Pretext to Refuse To Comply With Section 251(c)

Condition VII is silent as to whether an Applicant's advanced services affiliate would be subject to regulation as an "incumbent LEC." SBC argued in a recent *ex parte* filing, however, that the advanced services affiliates permitted by Condition VII would *not* be subject to Section 251(c) and the other provisions of the Act applicable to incumbent LECs.[72] While SBC's claim is meritless, the ambiguity created by Condition VII would permit Applicants' advanced services affiliates to refuse to comply with Section 251(c), and would force competitive LECs to undertake the costly and time-consuming process of litigating this issue while Applicants enjoyed freedom from the requirements the Commission has recognized are a "cornerstone" of the Act. *Section 706 Order* ¶ 73.[73]

More specifically, according to SBC, a BOC's Section 272 affiliate is not itself a "Bell Operating Company" pursuant to the definition of that term in Section 3(4) of the Act, which provides that a "successor or assign" of a Bell Operating Company is also a BOC. SBC contends that an advanced services affiliate would therefore not be a "successor or assign" for purposes of the definition of "incumbent local exchange carrier" in Section 251(h)(1)(B)(ii). This reasoning is flawed in at least two fundamental respects.

First, there is no basis to presume (as SBC necessarily does) that Section 272 is a roadmap to attaining "competitive LEC" status. Indeed, nothing in that section, or in any other part of the Act, suggests that an incumbent LEC may evade the obligations of Section 251(c)

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[72] *See* Letter from Michael K. Kellogg, (Kellogg, Huber, *et al.*) to Christopher J. Wright, (FCC) CC Docket 98-141, (FCC June 25, 1999) ("SBC Data Affiliate *Ex Parte*").

[73] The centrality of Section 251(c) to the Act is apparent from the fact that it is one of two sections for which Congress prohibited regulatory forbearance. *See* 47 U.S.C. § 160(d).

merely by creating a separate affiliate. Second, even if (contrary to fact) SBC were correct that compliance with Section 272 would allow an advanced services affiliate to avoid incumbent LEC status, Condition VII would impose requirements that are dramatically weaker than Section 272. Applicants' data affiliates thus would fail even their own misguided test for "competitive LEC" status.[74]

1. Congress Did Not Intend Section 272 as the Measure of "Incumbent LEC" Status

The *Non-Accounting Safeguards Order*[75] recognized that Sections 251 and 272 have "different underlying purposes." *Id.* ¶ 205. Congress tailored the Section 272 requirements to reduce the risks that a BOC entering the interLATA market would use its market power over local exchange facilities to undermine competition. *See id.* ¶ 206. There is simply no basis to presume that the Section 272 requirements can – or that Congress intended them to – serve Section 251(c)'s separate purpose to "ensure that incumbent LECs do not discriminate in opening their bottleneck facilities to competitors." *Id.* ¶ 205.[76] Moreover, even to the extent that

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[74] Of course, even if SBC were correct (as it is not) that an SBC/Ameritech advanced services affiliate could evade regulation as an incumbent LEC, such an affiliate nevertheless would be bound by the restrictions of Section 271(a). That section provides that "Neither a Bell operating company, *nor any affiliate of a Bell operating company*, may provide interLATA services except as provided in this section." 47 U.S.C. § 271(a) (emphasis added).

[75] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd. 21905 (1996).

[76] In addition, the Act lists different separation requirements for BOC affiliates engaged in manufacturing (Section 273) and electronic publishing (Section 274), and the Commission has made clear that each of these sections imposes independent and distinct obligations on BOCs entering those fields. The Commission has even gone so far as to hold that the phrase "operate independently" in Section 272(b)(1) should not be read to impose the same obligations as "operated independently" in Section 274(b). *See Non-Accounting Safeguards Order* ¶ 157. The Act therefore provides no basis to conclude that an incumbent LEC affiliate may be deemed a non-incumbent LEC under Section 251(h) by complying with only the separation requirements (continued . . .)

Section 272 were pertinent to an affiliate's "incumbent LEC" status, that section was intended to permit a BOC to operate a separate affiliate only *after* a BOC had opened its local market to competition by fully satisfying the requirements of Section 271; neither SBC nor Ameritech has yet done so.[77]

SBC's argument hinges on its claim that because a Section 272 affiliate is not a "successor or assign" for purposes of Section 3(4), any entity that adheres to that section's requirements also would not be a "successor or assign" under Section 251(h). But the regulatory implications of an entity being deemed a "BOC" are dramatically different that those that flow from "incumbent LEC" status,[78] and SBC offers no grounds to presume that Congress intended the tests for "successor or assign" status to be identical under in these two very different sections of the Act. As the Commission recognized in its *Section 706 Order*, the phrase "successor or assign" is not capable of a single definition. Instead, a determination of its meaning "must be based on the facts of each case and the particular legal obligation which is at issue." *Section 706*

(. . . continued)
of Section 272.

[77] The SBC Data Affiliate *ex parte* offers a sheer *non sequitur* when it contends that because it can today market advanced services using the SBC brand, provide operations, installation and maintenance ("OI&M"), and engage in other activities on an unseparated basis, it should therefore be able to engage in these same activities using an advanced services affiliate that is regulated as a competitive LEC. *See Id.* at 4. AT&T agrees that SBC could today form an affiliate and use that entity to provide advanced services, but that fact is irrelevant to the status of that affiliate under Section 251(h). When SBC today conducts these activities on an integrated basis, it does so as an *incumbent LEC*. The act of forming an affiliate that fails to adhere to *even the requirements of Section 272* plainly is insufficient to permit SBC to evade Section 251(c) – and SBC offers no serious argument to the contrary.

[78] To take the most obvious example, the Act permits entities that are incumbent LECs, but which are not BOCs or BOC affiliates, to provide interLATA telecommunications originating within their regions without first satisfying the requirements of Section 271.

Order ¶ 104 n.202 (internal quotation omitted). The D.C. Circuit also has recognized that identical terms may have different meanings in different sections of the Act, depending on the purposes they serve.[79] SBC's attempt to mechanically apply the Act's definition of a "Bell Operating Company" to Section 251(h)'s standard for deeming an entity an incumbent LEC is wholly misguided.[80]

The Commission's interpretation of Section 251(h) must be based on the purposes of Sections 251(c) and 252 and on the legal obligations they impose. The core purpose of Sections 251(c) and 252 is to open the local exchange market to competition by mandating that incumbent LECs give competitive LECs nondiscriminatory access to their monopoly-controlled bottleneck local exchange networks. By receiving such open, nondiscriminatory access, competitive LECs can compete directly against the incumbent LEC in the local exchange and exchange access market using parts of the incumbent LEC's own network, either by using network elements or by reselling incumbent LEC services. The determination whether an incumbent LEC affiliate is sufficiently separated from an incumbent LEC so as not to be deemed

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[79] *See U S West Communications v. FCC*, 1999 WL 362834, at *3 (D.C. Cir. June 8, 1999) ("[A]lthough we normally attribute consistent meanings to statutory terms, '[i]dentical words may have different meanings where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different.'") (quoting *Weaver v. USIA*, 87 F.3d 1429, 1437 (D.C. Cir. 1996)).

[80] Even ignoring an SBC-Ameritech advanced services affiliate's status as a "successor or assign," the affiliate described in Condition VII would nonetheless be subject to incumbent LEC regulation as a "comparable" carrier under Section 251(h)(2). This provision does not require that an affiliate supplant an incumbent LEC for all, or even most, services before it becomes subject to incumbent LEC regulation. Indeed, such a formulation would allow Applicants to avoid Section 251(h)(2) altogether through the simple expedient of employing multiple affiliates, each providing its own local exchange or access services within its own service area. *See* Reply Comments of AT&T Corp., CC Docket No. 98-147, at 23-24 (FCC Oct. 16, 1998) ("AT&T 706 Reply Comments").

a "successor or assign" necessarily must focus on the impact particular separation requirements would have on the market-opening goals of Sections 251 and 252.

As the Commission already has found, there is no legal or technical basis to distinguish between local exchange or exchange access services and "advanced services," and the technologies used for advanced services are fully capable of transmitting voice communications. *Section 706 Order* ¶¶ 35-37, 40-44. Thus, the Commission's determination of the separation requirements necessary to ensure that an affiliate is sufficiently separate from an incumbent LEC to avoid being regulated as an incumbent LEC cannot rest on the fact that the affiliate provides advanced services rather than (or in addition to) other forms of local exchange and exchange access.

It is even clearer that an SBC-Ameritech advanced services affiliate must be deemed an "incumbent LEC" for purposes of the Act because those entities are *not* limited to providing solely "data" services, but can provide voice services as well. As shown above, Condition VII defines "Advanced Services" in a manner that would include VoIP and other voice services, and other portions of Condition VII seem to presume that these affiliates will be able to provide voice-grade services.[81] Applicants plainly may not evade their legal obligations as incumbent LECs merely by establishing an affiliate subject to the very limited requirements imposed by Condition VII. Indeed, if they could do so, then Applicants could move their most profitable customers to their affiliates, while neglecting to invest in and upgrade the public telephone network used by their other customers – and to which their competitors would have access

[81] For example, Paragraph 34(b) of the Proposed Conditions requires an affiliate to certify for line sharing purposes that it is not providing voice on a particular loop.

pursuant to Section 251(c).[82] The affiliates could, in effect, operate a shadow network, as there is nothing that would prevent these entities from building the only local loops serving new housing developments or office parks, or otherwise constructing their own "competitive LEC" network wholly-owned by Applicants, and operating in their own territory using Applicants' service marks. A central purpose of Section 251(h)'s "successor or assign" provision plainly is to bar an incumbent LEC from evading its obligations under Section 251(c) by foregoing local network investment (whether involving enhancements or expansion) in its own name, and instead leaving such investment to an affiliated entity acting as the incumbent LEC's alter ego.[83]

2. Condition VII is Significantly Less Stringent than Section 272

Even if SBC's attempt to use Section 272 as the measure of an affiliate's status as an incumbent LEC were not otherwise meritless, it is simply irrelevant. While the separate affiliate provisions of Condition VII are purportedly modeled on Section 272 of the Act, they are dramatically weaker than the structural separation requirements Congress imposed in that section.

Condition VII provides (¶ 27) that Applicants' advanced services affiliates will be subject to Sections 272(b), (c), (e) and (g), except to the extent those subsections are inconsistent with the provisions of that paragraph. Thus, at the outset, Condition VII announces exceptions to

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[82] Many commenters in the *Section 706 NPRM*, including several state commissions, warned the Commission of this risk. *See* AT&T 706 Reply Comments at 21, 24-25 (citing comments by Florida and Indiana regulatory commissions and the staff of the Wisconsin state commission).

[83] AT&T discussed the separation requirements that would be necessary in order for an incumbent LEC affiliate to avoid regulation as an incumbent LEC in its comments and reply comments on the Section *706 NPRM*. Rather than burden the record by repeating all of those arguments here, AT&T hereby incorporates its comments and reply comments in that docket, in their entirety, into this pleading by reference. Comments of AT&T Corp., CC Docket No. 98-147 (FCC Sep. 25, 1998) ("AT&T 706 Comments"); AT&T 706 Reply Comments..

Section 272, and entirely omits Section 272(d), which requires BOCs to undergo detailed audits expressly designed to detect violations of the separation and nondiscrimination requirements of Section 272. Further, Condition VII merely requires (¶ 27) Applicants to comply with the selected portions of Section 272 "as interpreted by the Commission as of July 1, 1999," despite the pendency of both judicial review and reconsideration petitions that could substantially affect the relevant rules and orders.

In a critical omission, Condition VII also fails to include any provisions designed to ensure that a SBC-Ameritech advanced services affiliate actually complies with the portions of Section 272 that Condition VII incorporates. The records compiled in the six Section 271 application reviews the Commission has conducted to date, as well as in numerous state Section 271 proceedings, clearly demonstrate that the BOCs – including SBC and Ameritech – have openly defied the Commission's Section 272 Rules while nevertheless claiming to be in compliance with them. AT&T's comments in the *Section 706 NPRM* carefully document the BOCs' sorry history in this regard.[84] To take just one example, in Section 271 application after Section 271 application BOCs have openly refused to comply with the Commission's repeated rulings that they must fully disclose their dealings with their affiliates as mandated by Section 272(b)(5).[85] Despite this uncontroverted record, Condition VII would allow Applicants' advanced services affiliates to begin joint marketing, reserving collocation space, or transferring equipment without any assurance beyond Applicants' "paper promises" of compliance.

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[84] *See* AT&T 706 Comments at 11-17.

[85] The Commission should also note that the fact that the BOCs have refused to disclose this critical information makes it likely that many other abuses have gone undetected.